No. 8875

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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MARY H. WILSON, WINFRED T. WILSON and FRANCIS A. WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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OPINION BELOW.

No opinion in this case has been rendered but the findings of fact and conclusions of law entered by the United States District Court for the Northern District of California are given in the record. (R. 22-26.)

JURISDICTION.

This appeal involves income taxes and is taken from the decree of the District Court entered on April 21, 1938. (R. 27-29.) Petition for appeal was filed May

26, 1938 (R. 78-79), pursuant to Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the appellants herein are liable as transferees of the property of Henry Wilson, deceased, for income taxes determined to be due from the latter for the years 1918 and 1919.

STATUTES INVOLVED.

Revised Statutes:

> Sec. 3213. It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action. (U.S.C., Title 26, Secs. 1644, 1645.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 617. Jurisdiction of Courts.

* * * * * * *

(b) The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the internal-revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws. (U.S.C., Title 26, Secs. 1523, 1698.)

STATEMENT.

This is a suit in equity filed by the appellee against Mary H. Wilson, Winfred T. Wilson, and Francis A. Wilson, for the collection of income tax due for the years 1918 and 1919 from Henry Wilson, deceased. The complaint alleges that a transfer of property shortly before the latter's death left him insolvent and that the appellants here are his transferees and are liable for the income tax referred to. (R. 1-8.) The answer, while admitting a transfer of a material part of the property belonging to the deceased, denies that the latter was insolvent and also denies that the prop-

erty which came to the appellants was impressed with a trust for the benefit of the United States. (R. 9-14.)

The facts as found by the District Court are as follows (R. 23-26):

Henry Wilson died on June 5, 1928, being at the time of his death a resident of the City of Piedmont, State of California. On June 1, 1928, he transferred to his wife, Mary H. Wilson, and to his son Francis A. Wilson, the whole of a savings account which he then had in the Main Office of "The San Francisco Bank", San Francisco, California. The savings account thus transferred amounted to $427,949.17, with interest amounting to $3088.56, or a total of $430,737.73. At the time such account was transferred, Henry Wilson was confined to his bed and under medical and nursing care. He was 79½ years old. The circumstances attending the transfer show that the account was transferred in contemplation of death. After his death, his wife and son paid the expenses of his last illness, funeral and some of his other debts out of the account so transferred. They made one gift to charity out of it, pursuant to the directions of the decedent, and divided the balance in the proportion of two-thirds to Mary H. Wilson, and one-sixth each to Francis A. and Winfred T. Wilson. The net amount received by Mary A. Wilson out of the bank account so transferred amounted to $270,727.68, and the amount received by each of the sons, Francis A. and Winfred T. Wilson was $67,681.92. They did not pay any part of the claims of the United States which were the subject of the complaint herein. (R. 23.)

On June 1, 1928, when the savings account was transferred, Henry Wilson was a party to litigation then pending before the United States Board of Tax Appeals involving his income tax liability for the years 1918 and 1919. He had received a deficiency notice from the Commissioner of Internal Revenue on September 4, 1925, notifying him of an additional assessment in the sum of $6591.52 for the year 1918, and an additional assessment for the year 1919 in the sum of $2596.80. He took an appeal on October 26, 1925, to the Board of Tax Appeals. The case was thereafter tried, and at the time of his death, was under submission to the Board of Tax Appeals. On November 6, 1928, the order of the Board was entered, fixing a deficiency tax assessment in the amount of $4782.35 for 1918, and $2059.45 for 1919. (R. 24.)

No appeal was taken from this determination of taxes. On May 18, 1929, said determination became final and assessments were duly made. (R. 24.)

At the time of the transfer on June 1, 1928, Henry Wilson owed miscellaneous debts created in relation to his last illness amounting approximately to $361.25. The expenses of his funeral and interment amounted to $4,042.15. He also owed personal income taxes to the United States for the years 1921-1924 in the sum of $13,101.01, and taxes for the years 1918 and 1919, as hereinabove stated. (R. 25.)

Transfer of his bank account by Henry Wilson to the defendants Mary H. and Francis A. Wilson was made in the privacy of their own home and was not a matter of public knowledge. The Commissioner of

Internal Revenue had no information upon it. He did not make a jeopardy assessment of the income taxes for the year 1918 and 1919, which were then pending in the Board of Tax Appeals. (R. 25.)

The only asset in which Henry Wilson had any interest following his transfer of the bank account was an interest in his home located in Piedmont, California. This home had been acquired by deed some years previously and was held by Mary H. Wilson and the deceased, Henry Wilson, as joint tenants with the right of survivorship. The fair market value of the residence in its entirety was $45,000. The fair market value of the interest of one of the joint tenants did not equal one-half of the fair market value of the residence. The sum total of the debts of Henry Wilson at the time of his transfer of his bank account exceeded the fair market value of his interest as joint tenant in said residence. (R. 25-26.)

From the foregoing findings of fact, the District Court reached the following conclusions of law (R. 26):

(1) That the transfer of the bank account of Henry Wilson in "The San Francisco Bank," amounting to $430,737.73 was fraudulent as to his creditors, and Henry Wilson was rendered insolvent by said transfer.

(2) The money so received by Mary H., Francis A., and Winfred T. Wilson was received by each of them impressed with a trust for the benefit of creditors of the deceased Henry Wilson, and the money so received by each of them constituted a trust

fund for the payment of income taxes due and owing to the United States by Henry Wilson for the years 1918 and 1919 in the following amounts:

For 1918 .....$4,782.35, and
for 1919 .....$2,059.45,

with interest thereon as allowed by law.

(3) That each of the transferees is accountable to this Court for the trust fund so received by each of them for the payment of the claims in suit.

SUMMARY OF ARGUMENT.

The District Court correctly held that the money transferred to the appellants here was a trust fund in their hands to pay income tax due from the transferor for the years 1918 and 1919. This conclusion was based on the finding that the transferor became insolvent at the time of the transfer.

The term insolvency in its correct sense means an inability to pay one's debts as they mature but such inability is to be determined in the light of the circumstances of each case, and assets must be amply sufficient to pay all debts which are presented. When this definition is applied here, it will be seen that the transferor's half interest in his residence, which was his sole asset, was not amply sufficient to meet the large amount of debts which were due. Moreover, it is evident that the transferor knew when the money was transferred that the property which he retained would not be sufficient to meet demands which would be made on him or his estate and either

intended to avoid paying the income tax claims, which were then pending, or instructed his family to whom the transfer of money was made to pay his taxes for him out of such money. In either case, the law is clear that the money constituted a trust fund in the hands of the transferees and so the District Court properly decided that the appellants here are liable as transferees for the income tax which their transferor had not paid.

ARGUMENT.

THE TRANSFER OF CERTAIN FUNDS TO APPELLANTS MADE THE TRANSFEROR INSOLVENT AND CAUSED THEM TO RECEIVE THE MONEY IMPRESSED WITH A TRUST FOR THE BENEFIT OF THE UNITED STATES TO THE EXTENT OF INCOME TAX DUE FROM THE TRANSFEROR FOR 1918 AND 1919.

This is a suit in equity to recover from the appellants, as transferees, income tax and interest thereon due from Henry Wilson for the years 1918 and 1919. Recovery is sought under the trust fund doctrine which has been frequently recognized by this Court. See *Steinberger v. United States,* 81 F. (2d) 1008 (C.C.A. 9th); *Leighton v. United States,* 61 F. (2d) 630 (C.C.A. 9th), affirmed, 289 U. S. 506; *Pann v. United States,* 44 F. (2d) 321 (C.C.A. 9th).

The bill of complaint alleged and the District Court held that the bank account of $430,737.73, which was transferred by Henry Wilson four days before his death to members of his family, constituted a trust fund for the payment of such taxes. In reach-

ing this conclusion, the District Court found that the transfer of such sum was fraudulent as to the transferor's creditors, and that it rendered him insolvent. Accordingly, the District Court held that the appellants are liable for the amount of tax and interest sued for herein. (R. 26.)

Apparently it is admitted by the appellants that. is this transfer rendered Henry Wilson insolvent, they received the money impressed with a trust and are liable as found by the District Court. But they contend that the District Court is in error in finding that Mr. Wilson was insolvent. Before discussing the evidence, which we believe clearly establishes insolvency here, we think it advisable to define the term "insolvent". In a popular sense, the word is sometimes used as meaning insufficiency of one's entire property to pay his debts. It is also used in a more restricted sense as meaning an inability to pay debts from the debtor's own funds as they become due in the ordinary course of business. *Toof v. Martin,* 13 Wall. 40, 47. The latter definition seems to be the one now generally accepted. *Commerce Trust Co. v. Woodbury,* 77 F. (2d) 478 (C.C.A. 8th); *Jeggle v. Mansur,* 17 F. (2d) 729 (C.C.A. 9th); *Dutcher v. Wright,* 94 U. S. 553, 557; *Buchanan v. Smith,* 16 Wall. 277, 308; *In re Ramazzina,* 110 Cal. 488; *Washburn v. Huntington,* 78 Cal. 573; Bouvier Law Dictionary, Vol. 2 (Rawle's 3d Revision).

But it should be noted that in determining the amount of one's assets or ability to pay, the Courts have indicated that such determination is not merely

a matter of figuring out a simple problem in arithmetic. There are a number of factors to be considered and each case is to be decided in the light of its own facts. Cf. *Franck v. Moran,* 36 Cal. App. 32, 37. Thus it has been held that a man may be insolvent yet have assets which slightly exceed the total amount of his debts. *Kehr v. Smith,* 20 Wall. 31. 35. In other words, the assets must be amply sufficient and the law does not permit a debtor to calculate nicely the amount of his assets in relation to his debts. Our position in this respect is well summarized in the following excerpts from *Rose v. Dunklee,* 12 Colo. App. 403, 412:

> the question whether a person is or is not solvent is not ascertained by the absolute striking of a balance between the debts on the one side and the ascertained value of the property on the other. A slight difference in favor of the amount of the property, or in favor of the amount of the debts, will not necessarily conclude the question. The courts have put it in various ways. Wherever the amount of the property so closely approximates the amount of the liabilities that the conveyance would have a direct tendency to impair the rights of creditors if they should attempt to force collection by judicial process, the debtor is adjudged insolvent. * * * The property which must remain to the debtor after such a transfer must be as some of the cases put it, clearly and amply sufficient to satisfy his debts, and it is enough in such a case to show that the grantor was embarrassed and in doubtful circumstances and his solvency or insolvency may be judged by what happens. * * *

When the principles of the above cases are applied to the facts of this case, we submit that the District Court correctly concluded that the transfer of the bank account rendered Henry Wilson insolvent and made the appellants here liable as transferees for the tax.

In regard to the property retained by Henry Wilson after the transfer of the bank account, the Court found that the only asset he had was an interest in his residence which he and his wife held as joint tenants with the right of survivorship. The appellants also attempt to show that Mr. Wilson was drawing a salary of $12,000 per annum from Wilson Bros. & Co. and that this was an asset to be considered here. However, as to this, the evidence shows that Mr. Wilson at the date of the transfer was a man over 79 years old, was then on his death bed, had not been actively interested in any business for some years except occasionally in an advisory capacity and that no salary had been fixed for him in 1928 although he did not die until June of that year. (R. 57, 61-62, 74.) Obviously, the so-called drawing account which appellants refer to does not appear to have been in existence during 1928, but if it was, it was not property which could be assigned for the benefit of creditors, and the District Court properly ignored it and found that the interest in the house was the transferor's sole asset.

As to the value of such interest, the Court found that the fair market value of the residence in its entirety was $45,000 but that Mr. Wilson's interest,

as one of the joint tenants, was less than one-half of $45,000 and was also less than his total debts at the time of the transfer of the bank account. (R. 25-26.) The appellants make two objections to these findings. One of these is that the full value of the residence instead of a part of it might have been used in payment of Henry Wilson's debts.

In making this objection, the appellants do not deny that the residence was held in joint tenancy with right of survivorship but contend that under California law where community property has been taken in joint tenancy by a husband and wife, each has a half interest as between themselves but that such property is still community property as against creditors and that the whole of it is liable for the husband's debts. (Br. 14.) In making this statement the appellants obviously are ignoring the fundamental differences between joint tenancy and community property which are so clearly brought out in the cases they cite as well as in many others.

California law allows a husband and a wife to hold property separately, in joint tenancy, or as community property.[1] But each class of ownership is to be considered as distinct from the others. Thus a piece of property cannot be held in joint tenancy and as community property at the same time. More-

1. Civil Code of California, 1937, Deering:

§ 161. *May be joint tenants, etc.* A husband and wife may hold property as joint tenants, tenants in common, or as community property. [Enacted 1872.]

§ 162. *Separate property of the wife.* All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. [Enacted 1872.]

over, it has been definitely established that even where property is purchased with community funds, it will be held by the husband and wife as joint tenants, if the deed is made out to them as joint tenants, and any oral declarations of theirs that the property is to be community property will have no effect. *In re Sterling,* 20 Fed. Supp. 924 (S.D. Cal.); *In re Gordon's Estate,* 44 F. (2d) 810 (S.D. Cal.).

As to the nature of the interest held by the wife as a joint tenant, it has been definitely established that, although such interest has the attributes which go with joint tenancy, it is her own separate property and comes in a different category from the wife's interest in community property. This was pointed out by the Supreme Court of California in *Siberell v. Siberell,* 214 Cal. 767, when it said (p. 773):

> First, from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character and, following the demise of either, to have contention made that his or her share in the property was held for the

> community, thus bringing into operation the law of descent, administration, rights of creditors and other complications which would defeat the right of survivorship, the chief incident of the law of joint tenancy. * * *

See also *Estate of Harris,* 9 Cal. (2d) 649; *Conard v. Conard,* 5 Cal. App. (2d) 91; *Paye v. Podal,* 4. Cal. App. (2d) 229; *Beemer v. Roher,* 137 Cal. App. 293; *Delanoy v. Delanoy,* 216 Cal. 23; *In re Kessler,* 217 Cal. 32; *Green v. Skinner,* 185 Cal. 435; *Estate of Gurnsey,* 177 Cal. 211.

Thus while the wife's community interest is under the control of the husband during his lifetime, her interest as joint tenant is her separate property and cannot be taken for the payment of her husband's debts without her consent or used by him in any way which will lessen her interest therein. Cf. *Estate of McCoin,* 9 Cal. App. (2d) 480. In support of their contention that the wife's interest here could be subjected to the payment of the husband's debts, the appellants cite *Hulse v. Lawson,* 212 Cal. 614, but that case is distinguishable. The Court found there that the property was not held in joint tenancy but continued to be community property after its purchase and also held that as a later conveyance of the whole to the wife was in fraud of creditors, the entire value was available for meeting the husband's liabilities. From this it is obvious that the *Hulse* case does not stand for the contention urged by the appellants here.

The second point which the appellants make as to value of the property retained by Mr. Wilson after

the transfer is that, even taking his individual interest in the house as his sole asset, its value should be found to be one-half of the fair market value of the house in its entirety or $22,500 and that such sum should be found to be in excess of the debts which appellants claim to be $20,160.76. (Br. 12.) In reply, it is our contention that the District Court properly found that Mr. Wilson's interest in the house was less than $22,500, and that it was not necessary for the Court to adopt a definite figure as the value of such interest since the debts were so large it is evident that the property retained after the transfer was not sufficient to prevent insolvency. We believe it is a matter of common knowledge that it is ordinarily more difficult to sell one-half of a house than it is a whole house, and for that reason the value of a half interest will usually be less than one-half of the whole. Certainly in this case, the Court was justified in reaching that conclusion. Mrs. Wilson, who was the other joint tenant, was quite old and in poor health. The house was her residence and even in case of a sale of a half interest she doubtless would have wished to remain there. But not being experienced in business she might have been very difficult to deal with, and the prospect of being a cotenant with her was not one which would have been generally welcomed. Accordingly, we think that the value of Mr. Wilson's interest in the house was less than one-half of $45,000, and that this is true regardless of whether the fair market value of such interest is used or the value on a forced sale.

The District Court referred to fair market value but it is doubtful if such value should be used as it

indicates the value obtained from a sale on an open market between a seller and a buyer who are willing but not obliged to sell or buy. *Crowell v. Commissioner,* 62 F. (2d) 51 (C. C. A. 6th). In the case of property which is taken for debt, it is necessary to make a quick disposition and forced sales are the practice. This means that the returns are less and there is also the expense of conducting a sale pursuant to judicial process. So it appears that in considering whether Mr. Wilson retained sufficient property to meet his obligations that the better estimate of value is that which could be realized from a forced sale and many Courts have adopted this as the standard. *Kehr v. Smith,* supra; *Rose v. Dunklee,* supra; *Walker and Lybrook v. Loring,* 89 Tex. 668.

In any case, we think the value of Mr. Wilson's property was not amply sufficient to meet his obligations. At the time he transferred his bank account of $430,737.73 on June 1, 1928, the claim for taxes here involved was then awaiting determination by the Board of Tax Appeals. Such claim was allowed by the Board to the extent of $6841.80. Other obligations included $361.25 in miscellaneous debts pertaining to Mr. Wilson's illness and a claim in taxes for the years 1921 to 1924 in the amount of $13,101.01. (R. 25.) These three items amount to $20,304.06.[2] The Court's

2. The appellants deduct $143.30 from the taxes for 1921 to 1924 for interest accruing from June 1 (date of transfer) to June 5 (date of transferor's death), but there is no evidence pertaining to this item in the record and no explanation of how that sum was computed. On the other hand, there is a statement by one of the transferees at the hearing that the amount paid as taxes for 1921 to 1924 was $15,198.54 (instead of $13,101.01) and the larger sum was also the amount deducted on the estate tax return as a debt owed by the decedent. (R. 50, 59.) In view of this evidence, it appears the appellants are not in position to complain as to the use of the amount of $13,101.01 and that such figure may be less than it should be.

finding indicates that the half interest in the house was given a value less than that amount and we think that there is ample justification for this conclusion. But even if it should be found that the interest equaled or even slightly exceeded the debts just referred to there are other circumstances which should be considered in determining the question of solvency.

As we have indicated above, the ability to pay debts as they mature is the generally accepted test which is applied in determining solvency, and such ability is to be determined by the circumstances of each case. In this connection, we have just pointed out the possible difficulties of selling the transferor's interest in the house, certainly in selling it for an amount in excess of $20,000. It has also been pointed out that the acknowledged claims against Mr. Wilson at the time of the transfer on June 1 amounted to $20,304.06. But we think it is significant, at least to the extent of finding out the transferor's intent, that the claims for 1918 and 1919 taxes as they then stood amounted to $9088.32 or $2246.52 more than the amount later allowed by the Board and used in computing the above claims. It will be seen that if $9088.32 is added to other claims existing on June 1, the total would be $22,550.58 which is of course more than what the appellants claim as the value of the half interest in the house.

Whether or not it is proper to use the larger amount, one thing is clear: Mr. Wilson knew when he made the transfer that such amount might be what he would be required to pay for 1918 and 1919 and he also knew

real estate taxes amounting to more than $1300 would soon be due, and as a matter of fact these were paid soon after his death. (R. 50.) As he must have known he could not meet all his obligations with the property he retained, these factors together with others lead us to the conclusion that he contemplated insolvency in making the transfer.

Among the other factors to be considered are his age and physical condition. He was then over 79 years old; had been sick for several weeks, and was under the care of two doctors and a nurse (R. 56-57) so he must have known his life expectancy was short, and he could do nothing to add to his resources at that time. But even so he did not hesitate to transfer the money with which he would normally have paid his debts and as this was done in his own home there was nothing to bring this to the attention of the Government or creditors generally. Furthermore, it was doubtless apparent to him that while he retained an interest in the residence, which theoretically might be used to pay his debts, actually by the time his true financial condition would be discovered there would be nothing at all in his estate. For he knew that the minute he died his wife would become the sole owner of their residence and would take it free of debt.

The District Court found that the transfer of the bank account on June 1, which was four days before Mr. Wilson's death, was in contemplation of death and as it was included in the estate tax return on that ground, and the tax was not contested by the appellants, they are not in the position to deny the Court's

finding. But such finding together with other facts in the case clearly lead to one of two conclusions. Either Mr. Wilson intended to defraud the Government of the taxes sued for here or he intended his family to pay it for him. The various factors we have discussed seem to bring this case clearly within the laws of California and of other states which provide that a voluntary transfer without valuable consideration by one who is insolvent or who acts in contemplation of insolvency is void as against existing creditors. *Gray v. Brunold,* 140 Cal. 615; *Lefrooth v. Prentice,* 202 Cal. 215; *Hauk v. Van Ingen,* 196 Ill. 20, 28; *Washington Central Bank v. Hume,* 128 U. S. 195, 211. If the transfer would be held void in California, as we believe it would, then the transferees should be liable here on the ground that the transfer was made in fraud of creditors.

We are aware that Mr. Wilson had a reputation during his lifetime of honesty and was in the habit of paying bills regularly. From this one might infer that he intended to pay the claim involved here and instructed his family to act for him. But under either view the money which was transferred to appellants came to them impressed with a trust for the payment of these taxes.

The appellants have at no time denied that the taxes are due and they took no steps to appeal from the Board's decision when it was rendered. They resist payment here merely by offering the technical objection that on the date when the transferor turned over a sum of money many times the amount of the claim

here, he retained an interest in a house, which although it was to go within four days time to Mrs. Wilson free of debt, was then big enough to pay this and other debts which the transferor had. The District Court found that the interest in the house was not sufficient to meet the transferor's obligations and that he was insolvent. We submit that there is substantial evidence to support the Court's finding and that it is in accord with established principles of the law on insolvency.

CONCLUSION.

The decision of the District Court should be affirmed.

Dated, September 16, 1938.

Respectfully submitted,

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